UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X
JOSE BALVERDE, individually and on behalf
of all others similarly situated,

Case No. 15 cv 05518 (ER)

Plaintiff,

- against -

LUNELLA RISTORANTE, INC. d/b/a
LUNELLA RISTORANTE, and GAETANA
RUSSO, jointly and severally,

Defendants.
---X

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO CERTIFY A CLASS

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Defendants Lunella Ristorante, Inc. ("Lunella") and Gaetana Russo, through their attorneys the Law Offices of Arnold N. Kriss, respectfully submit this Memorandum of Law in opposition to plaintiffs' motion to certify a class pursuant to *FRCP 23*.

PRELIMINARY STATEMENT

As described below, the named plaintiff Jose Balverde ("Balverde") has given three different accounts of the amount of overtime and hours he allegedly worked at Lunella. With respect to the four add-on plaintiffs, Sadik Djecbitric ("Djecbitric"), Jorge Molina ("Molina"), Carlos Garcia ("Garcia"), and Angel Sevilla ("Sevilla"), some claimed in discovery that they worked overtime, some did not; some claimed that they were not paid for all of their hours worked, and some have no such claim according to the proof; some allegedly paid a percentage of their tips to Lunella's manager, and some did not; and some allegedly worked "spread of hours," and some did not.

Under these circumstances it is respectfully submitted that plaintiffs have entirely failed to satisfy the requirements under *FRCP 23* for adequate representation, commonality, and typicality.

FRCP 23's requirement of numerosity has also not been met. At the beginning of this case plaintiff sought conditional *Fair Labor Standards Act* ("*FLSA*") class certification for front of the house and back of the house employees. Even under the extremely lenient standards of conditional class certification plaintiff was unable to make a case as to back of the house employees, and conditional *FLSA* certification was denied as to back of the house. (See this Court's decision, Docket #37).

Yet, in its current motion plaintiff seeks *FRCP 23* class certification again for both front of the house and back of the house employees, and plaintiffs do so with no more evidence now than they had before. Plaintiffs' argument without including the back of the house employees will fail to satisfy the numerosity requirement.

POINT I

THE NAMED PLAINTIFF JOSE BALVERDE WILL NOT ADEQUATELY REPRESENT THE INTERESTS OF THE PROPOSED CLASS (*FRCP RULE 23 (a)(4)*)

Under *Rule 23(a)(4),* adequacy of representation is measured by two standards. First, class counsel must be "qualified, experienced and generally able" to conduct the litigation. Second, the class members must not have interests that are "antagonistic" to one another. *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 291 (2d Cir. 1992). We address the second part first because we submit it is first in order of importance.

A. Balverde's Interests are Antagonistic to the Proposed Class:

The adequacy inquiry under *FRCP 23(a)(4)* serves to uncover conflicts of interest between named parties and the class they seek to represent. See *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157–158, n. 13, 102 S.Ct. 2364, 2370–2371, n. 13, 72 L.Ed.2d 740 (1982). "[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *East Tex. Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 403, 97 S.Ct. 1891, 1896, 52 L.Ed.2d 453 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216, 94 S.Ct. 2925, 2930, 41 L.Ed.2d 706 (1974)).

Here, Balverde gave one set of facts in his complaint as to his hours and overtime (Docket #1); he told a different tale in his *FRCP 26* damage calculation (Exhibit B); and Balverde changed his story yet again during his deposition (Exhibit A). It is respectfully submitted that under these circumstances it is impossible for this Court to discern what exactly the injury is that was allegedly suffered by Balverde or which version of the facts should be relied upon, and as a result, there is no way that we can tell whether Balverde has the same interests or suffered the same injury as the proposed class members. Balverde's multiple stories are so divergent that we respectfully submit none of his allegations should be credited by this Court.

At the outset, Balverde swore in his deposition that he read the complaint in this case and that everything therein is true. (Balverde dep., Exhibit A, page 29, lines 18-23). He testified further at his deposition that there is nothing in the complaint that he believed to be true at the time the complaint was filed, but which he no longer believes is true. (Exhibit A, Page 30, lines 5-8). In light of that, his *FRCP 26* damage calculation and further deposition testimony make no sense.

The primary allegation by Balverde is found in plaintiffs' complaint paragraph 36 where it alleges that "in total, Balverde worked between approximately sixty and sixty-two (60-62) hours per week, and sometimes more" and that he was not paid for the hours over 40. In addition to the alleged unpaid overtime, this allegation implies that Balverde worked more than ten hours a day, every single day, six days a week, giving rise to a "spread of hours" claim for virtually every single day he worked at Lunella.

These allegations in the complaint are belied by his own *FRCP 26* damage calculation. (Exhibit B). As shown, the first column is for "Hours Paid" which purports to represent a compilation of the hours on the pay stubs and other records provided to plaintiffs by defendants in discovery; but, as we know, plaintiff alleges that he actually worked more than those hours, so the next column is for the hours that he claims he really worked titled, "Approx. Hours Worked."

According to his own damage calculation, in the 75 weeks Balverde worked at Lunella, never once did plaintiff work as many as 62 hours in a week. In fact, according to him, in the 75 weeks Balverde worked at Lunella the most hours per week he ever worked was 55, and in the entire 75 week time period Balverde worked at Lunella he worked overtime only 37 times, less than half the time. (Exhibit B). This belies Balverde's claim, paragraph 36 of the complaint, that there was a scheme to have the employees "typically" work overtime every week, "six (6) days per week, between nine and ten (9-10) hours per day, and sometimes substantially more."

Neither Balverde nor any of the other opt-in plaintiffs have any notes, records, or other evidence of the amount of overtime or hours that they allegedly worked to contradict the records kept by Lunella. Since there is no such evidence, the above allegation of a common scheme, resulting in the same amount of overtime hours for plaintiff, every other employee, every week, is the only way that plaintiffs could hope to demonstrate that they had common claims and/or prove any amount of damages in this case.

In light of the disparity between the allegations in the complaint and Balverde's damage calculation, we respectfully submit there is no way that this Court could find Balverde's claims are not antagonistic to such a proposed scheme.

Still further, Balverde changed his story yet again during his deposition where he decreased even further the amount of hours he "typically" worked in a week. While his damage calculation states that he worked as many as 55 hours in a week 37 times, Balverde testified in his deposition that he only worked more than 50 hours in a week 3 or 4 times in the entire year and a half that he worked at Lunella (Balverde dep., Exhibit A, Page 69 line 19 to page 70 line 9):

Q: Were there any weeks where you worked more than 50 hours while working at Lunella?

A: Only three or four times because at Lunella, they have a system that they don't pay for the sixth working day. If I ever worked a sixth day in the week, that was only for tips.

Q: How often did you work that sixth day?

A: As I have already told you, three or 4 four days in total. I do not recall. It wasn't more than that.

Q: When you say in total, you're saying three or four days in the entire time you worked at Lunella?

A: That's correct.

From this testimony any theoretical claim by Balverde for spread of hours, i.e. more than ten hours in a day, is therefore virtually nonexistent. Balverde has presented no evidence to support which days those spread of hours days could be. Since Balverde barely has a claim himself for spread of hours, certainly he cannot represent a class in that respect.

The evolution of Balverde's claim has therefore gone from:

(i) In the complaint -- 62+ hours worked per week, every week, with "typically" six work days a week. Under this theory he would be due overtime every week, and spread of hours for every single day he worked at Lunella;

(ii) In his Rule 26 damage calculation -- he never worked more than 55 hours in any week, and overtime only 37 times (less than half the time);

(iii) In his deposition -- never more than 50 hours worked in a week except three or four times out of a total 75 weeks worked at Lunella, with the potential for spread of hours therefore almost nonexistent.

It is respectfully submitted that the varying accounts of the amount of hours worked by Balverde, and the evolution of his potential to recover for spread of hours, make it impossible to believe that Balverde worked any overtime or spread of hours at all. Consequently, it is impossible to credit Balverde's version of the amount of hours that he worked.

It is not the function of the court on a *FRCP 23* class certification motion to evaluate the merits of the case. However, it is respectfully submitted that does not require this Court to ignore Balverde's blatant and willful falsities in his above referenced testimony and evidence. Under these circumstances, the Court should not credit any of the allegations Balverde leveled concerning any of his claims and there is no way to know whether Balverde possesses the same interests and suffered the same injury as the class members as is required for class certification under *FRCP 23(a)(4)*.

B. Class Counsel is Not Qualified to Conduct the Litigation:

Plaintiffs' counsel provides statements in their motion about the length and breadth of their experience and prior cases they have worked on in order to support their argument that they are qualified to conduct this litigation. We are not in a position to contradict any of those representations with respect to any of the prior cases.

However, there are, to say the least, indications that counsel in this case has not conducted its due diligence. This Court is generally referred to the deposition of add-on plaintiff Djecbitric in which he described that no one from the Pelton Law Firm spoke to him or interviewed him about providing answers to his interrogatories, he did not meet with any lawyers from the Pelton Law Firm to prepare him for his deposition, and in fact he never met with any lawyer from the Pelton Law Firm for any purpose until the morning of his deposition. Djecbitric testified that the only person at the Pelton Law Firm he ever spoke to was a "Ricardo" who is upon information and belief a paralegal. (Djecbitric dep., Exhibit C, Pages 46 - 53).

Further, the attorney that Djecbitric did meet with is Allison Mangiotardi, Esq. (Djecbitric dep., Exhibit C, Page 17, lines 3-20). Ms. Mangiotardi appears to exhibit a lack of understanding that interrogatory responses must be sworn. See also the deposition of add-on plaintiff Garcia where Ms. Mangiotardi denies that *FRCP 33* requires interrogatories to be signed under oath. (Exhibit I, Pages 64-65).

The same level of inattention is true with respect to plaintiff Sevilla who testified that he was not prepped for his deposition and that he never met with anyone at the Pelton Law Firm except for a paralegal. (Exhibit G, Pages 52-63). In the deposition of add-on plaintiff Jorge Molina (Exhibit E, Pages 41-51) he testifies that he never met with a lawyer at the Pelton Law Firm, and was not prepped in any way for his deposition.

Finally, the Court is referred to Molina's and Garcia's *FRCP 26* damage calculations which Molina and Garcia testified they had no input in creating. (Exhibits F and J; Molina dep., Exhibit E, Page 67, lines 7-18; Garcia dep. Exhibit I, page 77, lines 3-19). As described below, there are some glaring irregularities with respect to the *FRCP 26* damage calculations propounded by the plaintiffs in this case.

POINT II

PLAINTIFFS HAVE FAILED TO DEMONSTRATE COMMONALITY AND TYPICALITY
(*FRCP RULE 23 (a)(2,3)*)

The "commonality" requirement is met if plaintiffs' grievances share a common question of law or fact. *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir.1997) (citing *In re Agent Orange Prod. Liab. Litig*., 818 F.2d 145, 166–67 (2d Cir.1987)). "Typicality" requires that the class representatives have claims typical of those shared by the class members. *Stinson v City of New*

York, 282 FRD 360, 370 (SDNY 2012).

As a practical matter, the two requirements tend to merge in the Second Circuit's class certification inquiry. See *Caridad v. Metro–North Commuter R.R.*, 191 F.3d 283, 291 (2nd Cir.1999). “Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claims and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.” See *General Tel. Co. v. Falcon*, 457 U.S. 147, 157–58 n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982).

Accordingly, we deal herein with commonality and typicality together.

There are four primary claims in this case: (A) overtime, (B) failure to pay for hours worked, (C) spread of hours, and (D) tips. There are a total of four add-on plaintiffs: Djecbitric, Sevilla, Molina, and Garcia and each of these add-on plaintiffs tell markedly different stories.

A. Overtime:

The Court is respectfully referred to Docket #’s 29-3, 29-4, and 29-5 which are affidavits from current Lunella employees previously submitted to the Court and which we incorporate herein by reference, all of whom state that there is no policy not to pay overtime at Lunella and that they were paid for overtime. In particular, we alert the Court to the affidavit of Luis Zambrano (Docket # 29-3) who confirms in paragraph 5 that overtime in and of itself is rare at Lunella.

Balverde's position regarding overtime is covered above, and we contrast his version of events with the following four add-on plaintiffs.

i. Djecbitric was a Server at Lunella who only worked there for one week. He confirmed in his deposition that he worked at Lunella only two or three days that week, and did not work overtime (Djecbitric dep., Exhibit C, Page 37, lines, 11-22):

> Q. You testified a few minutes ago that there were days or weeks that you worked at Lunella and you only worked two or three days that week.
>
> A. Yes.
>
> Q. So you didn't work a full 40 hours, correct?
>
> A. No, not 40 hours. No.
>
> Q. Is there ever a time where you worked 40 hours, but you only get paid for 32 hours, say?
>
> A. No, I didn't work 40 hours. Let's say three days, maybe 20 hours.

Djecbitric confirmed further that his typical hours in that time were from 4:00 p.m. to 11:00 or 11:30 p.m. (Djecbitric dep., Exhibit C, Page 28, lines, 17-25). This contradicts plaintiffs' theory of this case and alleged common theme that employees worked from approximately 11:00 a.m. to 11:00 p.m. every shift:

> Q. I see. I want to make sure that we're talking about the same thing. On a normal day, you would get there for the dinner shift at 4:00 p.m., right?
>
> A. Yes.
>
> Q. And you would leave around 11:00, right?
>
> A. 11:00, 11:30, yes.

ii. Sevilla was a Runner at Lunella. He testified during his deposition that by the time he left Lunella he only worked two or three days a week. As Djecbitric, he did not work overtime on those weeks. (Sevilla dep., Exhibit G, Page 35, lines 2-5; Page 35, lines 21-24):

> Q. So most of the time you were leaving the restaurant at the end of your shift at around 10:00 or 10:30 p.m.; is that correct?
>
> A. Yes.
>
> * * *
>
> Q. So at the time that you left, it was still a slow period and you were only working two or three days a week; is that correct?
>
> A. Yes.

It is clear that Sevilla was not subject to a common scheme whereby he "typically" worked overtime and was not paid for it. Sevilla was specifically questioned during his deposition about the hours in all of his pay stubs and he testified unambiguously that he was not able to state that he worked more than the hours shown (Sevilla dep., Exhibit G, Page 45, lines 9-15):

> Q. So for all of your pay stubs, you don't remember whether you worked more hours than it's stated on the pay stub, correct?
>
> MS. MANGIATORDI: Objection.
>
> A. No.
>
> Q. No, you don't remember?
>
> A. No, I don't remember.

Amazingly, plaintiffs' counsel Ms. Mangiotardi tried to resurrect Sevilla's testimony by cross examining her own client during his deposition. Sevilla again confirmed that he is unable to remember whether he worked more than 40 hours as shown on his pay stubs. (Sevilla dep., Exhibit G, Page 64 line 21 to page 65 line 7):

Q. Do the checks accurately show the number of hours that you worked in a week?

MR. LEFKOWITZ: Objection. Asked and answered.

A. I don't remember.

Q. If the check showed 40 hours, did you work 40 hours?

MR. LEFKOWITZ: Objection. Asked and answered. She's also leading her witness.

A. I don't remember.

Finally, there is Sevilla's *FRCP 26* damage calculation. (Exhibit H). As noted above for Balverde's *FRCP 26* damage calculation, Sevilla's damage calculation includes a column for "Hours Paid" which purports to reflect what is on his pay stubs, and the next column is for "Apprx. Hours Worked" which is what he claims he really worked.

There are two crucial points to note about Sevilla's damage calculation. *First*, Sevilla worked at Lunella for a total of 15 weeks, and in that time, even according to his own claims about what he really worked, he worked overtime only three times. This is far outside the allegedly common scheme that every employee "typically" worked over time every week and did not get paid for it.

Second, as cited above, Sevilla admitted in his deposition that he has no recollection of the hours he worked, either above or below 40. Yet, in this damage calculation Sevilla arrives at precise and varying numbers of the hours he allegedly really worked for each and every week. It is respectfully submitted that either this damage calculation was created by plaintiffs' counsel or Sevilla is untruthful.

iii. Molina was a Server at Lunella. He testified in his deposition consistently with the complaint, namely, that he regularly, every single week, worked more than 40 hours and did not get paid overtime. Molina even maintained that the weeks where his pay stub reflects only eight hours of work in a given week he nonetheless worked more than 40 hours. (Molina dep., Exhibit E, page 40, lines 6-21):

> Q. So let's go to the previous paycheck for November 13th, 2014. Again, it says eight hours worked. Do you see that?
>
> A. Yes.
>
> Q. Do you have any reason to believe that's incorrect?
>
> A. Yes.
>
> Q. What should it be?
>
> A. More than 50 hours.
>
> Q. Again, you worked more than 50 hours that week?
>
> A. Yes.
>
> Q. How do you remember that?
>
> A. Because I never worked less than five or six shifts, six days a week.

Again, this testimony is at direct odds with Molina's *FRCP 26* damage calculation which shows many weeks where even according to his own claims he worked less than 40 hours. (Exhibit F). As shown on the damage calculation chart, Molina worked at Lunella for 60 weeks in 2012 and 2014 combined, and of those weeks, according to his own damage calculation, he did not work overtime 19 times. Mathematically, it must be concluded that almost one third of the time Molina did not work any overtime, which means Molina's testimony is untruthful.

Further, despite his deposition testimony above Molina also testified that he reviewed the damage calculation chart and that it is correct. (Molina dep., Exhibit E, Page 67 line 19; Page 68 line 5):

Q. When you reviewed this document, did you check it for accuracy?

A. I don't get that question. I'm sorry.

Q. Well, when you reviewed this document this morning, did you check to make sure that everything was correct?

A. Yes.

Q. To your knowledge, is everything in here correct?

A. Yes.

iv. Garcia was a Server at Lunella. For Garcia, let's begin with his *FRCP 26* damage calculation. (Exhibit J). There, in the 41 weeks Garcia worked at Lunella, according to his own statement about the hours he supposedly really worked, he claims that he worked overtime 12 times. As a reminder, the allegations in the complaint for which plaintiffs seek class certification are that there was a common scheme or plan for employees to work overtime every week, 62+ hours per week, and not be paid for it.

Furthermore, Garcia's deposition testimony is that he worked overtime "most of the time" which is plainly false according to his own damage calculation. (Exhibit I, Page 24, lines 2-4). This raises the question again, how were these damage calculations prepared? Are they lawyer created documents, or was Garcia also untruthful?

Additionally, Garcia testified that he only worked at Lunella three or four days a week. (Garcia dep., Exhibit I, Page 22, lines 15-21):

Q. So when you say that it was slow for you at Lunella during the winter, that means that they did what all the other restaurants that you worked at did. They cut your shifts, right?

A. No, at Lunella, they had me working three to four days. If it was busy or not busy, they would have me three or four days a week.

Garcia apparently recognized this testimony was damaging to plaintiffs' position, so he tried to change it to a regular five day per week schedule and that he only worked 3 or 4 days when Lunella's business was slow in the winter. But we not that: (1) his original testimony of working three or four days a week is entirely consistent with the amount of hours in his pay stubs, and (2) he never worked at Lunella in the winter. He worked from Spring to Fall 2014 as set forth reflecting his work dates in his *FRCP 26* damage calculation. (Exhibit J).

For the foregoing reasons, we respectfully submit that the varying accounts given by Balverde of the amount of overtime he worked, juxtaposed with the varying accounts from the add-on plaintiffs, fails to satisfy the commonality or typicality requirements for *FRCP 23* class certification.

B. Alleged Unpaid Hours Worked:

The way we know that plaintiffs' claims are bogus in this regard is that in plaintiffs' brief they mischaracterized the testimony by Lunella's Night Manager Goran Segota ("Segota"). They argue on brief pages 5-6 that Segota kept track of the hours worked by Lunella's employees merely by using the work schedule, without regard for the supposed times the employees actually arrived and left, and that Segota allegedly admitted that employees worked hours (or a sixth day in a week) for which they were not paid.

Simply put, the citations to this testimony do not say what plaintiffs claim. Never, in his entire deposition, did Segota state that Lunella employees worked hours for which they were not paid. (Exhibit K).

Such a mischaracterization of Segota's testimony culminates on page 6 of plaintiffs' brief where they argue that "prior to the implementation of the time clock, Segota tracked employees' hours worked by marking the time hourly employees arrived at work and marking that they left eight (8) hours later, regardless of whether the employee worked more than eight (8) hours."

The words "regardless of whether the employee worked more than eight (8) hours" is inaccurate. The accurate testimony is (Segota dep., Exhibit K, page 20 line 20 - page 21 line 16):

> Q. And what would you do to ensure that the employees were paid for all of the time that they actually worked?
>
> MR. LEFKOWITZ: Object to the form. Go ahead and answer.
>
> A. I don't make sure that they're paid. I just put down their hours and send that to the accountant and then the paper, everything that I send.
>
> Q. So before there was a time clock how would you determine the total number of hours worked during a week?
>
> A. Okay. If an employee is scheduled to come to work at 2:00 and I come after that I assume he was there 2:00. If he was late I would be notified by the day manager. And they leave at 10:00. I count that as a workday. Eight-hour workday. **If there is any unusual events -- they get emergency call, they leave early -- I write it down.**

To support plaintiffs' argument about keeping track of employees' daily comings and goings for their paycheck, plaintiffs refer to page 15 line 11-22 of Segota's deposition. However, that testimony is distinctly not about daily time keeping for payroll purposes but instead is about scheduling. (Segota dep., Exhibit K, page 15, lines 11-22):

Q. Do you set schedules?

A. I do.

Q. How do you do that?

MR. LEFKOWITZ: Object to the form. Go ahead and answer.

A. I have a table, a sheet, a chart, with their names and the days of the week and I mark what days what waiters worked and I also mark the times they come to work and they leave eight hours after. The noted time. The time noted on the schedule.

Another example of plaintiffs' mischaracterization of Segota's testimony is also found on plaintiffs' brief, page 6 where they argue that "employees paid based on number of days worked, eight (8) hours per day, not based on actual hours worked each day and never paid for sixth day." In support of this argument they cite "Segota Depo. at 20:14-20:19; 21:5-21:16; 47:5-48:4; 55:8-55:13."

We have attached the entire Segota deposition transcript. (Exhibit K). Without belaboring the point, the Court may see plainly that nowhere in plaintiffs' cited testimony, or anywhere in Segota's deposition, does he state or even suggest that employees worked hours, a sixth day, and did not get paid for it. The deposition citations provided by plaintiffs just simply do not stand for such a proposition and we respectfully submit that such a blatant mischaracterization of Segota's testimony is bad faith and evidently plaintiffs doubt their proffered testimony and evidence.

In each of the *FRCP 26* plaintiffs' damage calculations submitted the first column is for "Hours Paid." This information appears to have been taken by plaintiffs directly from Lunella's records and employee pay stubs which were provided to plaintiffs in discovery. All of those figures appear to be correct for that column. Accordingly there is no shortage of proof for

Lunella's defenses as to the actual hours worked by each plaintiff.

In contrast, plaintiffs have not supported their argument with any notes, memos, records, emails, letters, or any other documents suggesting that any of plaintiffs worked more than the hours shown on their pay stubs. At this litigation stage it is not the purpose of the Court to evaluate credibility. However, we respectfully submit that this Court must take into consideration the material, sizable inconsistencies and irregularities described above regarding alleged overtime hours and hours worked.

Furthermore, there is specific proof negating any class of employees based upon a claim for unpaid hours worked. First, as reflected above, Sevilla was unable to testify that any description of the hours worked on his pay stub is inaccurate. (Sevilla dep., Exhibit G, Page 45, lines 9-15):

> Q. So for all of your pay stubs, you don't remember whether you worked more hours than it's stated on the pay stub, correct?
>
> MS. MANGIATORDI: Objection.
>
> A. No.
>
> Q. No, you don't remember?
>
> A. No, I don't remember.

As noted above, Djecbitric testified that he worked either two or three days in the one week he worked at Lunella. His damage calculation indicates that he was paid for 16 hours, which accurately represents two, eight hour days. (Exhibit D). In light of the fact that Djecbitric cannot specifically recall whether it was two or three days that he worked, there can be no claim that he was not paid for all of the hours that he worked.

Accordingly, in light of the enormous inconsistencies in the plaintiffs' testimony regarding overtime hours, and the fact that two out of the four add-on plaintiffs specifically have no claim for alleged unpaid hours worked, we respectfully submit that the plaintiffs have failed to satisfy the mandatory requirements for class certification.

C. Spread of Hours:

i. Sevilla. As Balverde, Sevilla has no claim for spread of hours. The following is taken from plaintiffs' counsel's questioning of Sevilla at his deposition. (Sevilla dep., Exhibit G, Page 66, lines 2-5):

> Q. To clarify, were you paid an extra hour at minimum wage when you worked over ten hours at Lunella?
>
> A. I don't remember.

ii. Djecbitric worked at Lunella for one week, a total of two or three days, and even his own account of the hours he allegedly really worked was 20 hours. Additionally, Djecbitric has no claim for spread of hours.

Accordingly, the only "common" or "typical" element is that the named plaintiff Balverde along with two of the four add-on plaintiffs do not have potential claims for spread of hours.

D. Tips:

The claim in the complaint with respect to tips is that a percentage of all tips were "kicked back" to Segota, and also that a percentage was given to the restaurant to offset the cost of accepting credit cards. As shown below, that is not the testimony of the add-on plaintiffs.

i. Djecbitric testified that the only participants in the tip pool were servers, runners, busboys, and the bartender. (Djecbitric dep., Exhibit C, Page 31 line 11 to Page 32 line 11):

Q. You said the waiters share in the tips?

A. Yes.

Q. Does anyone else besides the waiters share in the tips?

A. Just the waiters. They sit down and do the money.

Q. Did Lunella employ a runner while you were there?

A. You mean was a runner -

Q. Yes.

A. Yes, there was a runner to bring the food out. Yes.

Q. Did the runner take part in the tips?

A. Of course.

Q. Did anybody besides the waiters -I'm going to call them servers because it can be man or woman, right?

A. Yes, that's fine.

Q. Did anyone besides the servers and the runner participate in the tip pool?

A. Yes. Runners, waiters, busboys, bartender. This is participating in the tip pool.

Q. Anybody else?

A. No, not that I know. No.

ii. Sevilla confirmed Djecbitric's testimony. (Sevilla dep., Exhibit G, Page 46, lines 5-13):

Q. Did the tips get pooled at Lunella?

A. Yes.

Q. Who took part in the tip pool?

A. The waiters, myself, the runner and I do not know if the female bartender was included or not.

Q. Did anybody else take part in the tip pool?

A. No, nobody else.

iii. Molina and Garcia testified materially inconsistently to Djecbitric and Sevilla. They state that they paid Segota a percentage from the tips left in cash, but Molina could not remember about the credit cards payments and Garcia denied that Segota received a percentage of credit card tips. (Molina dep., Exhibit E, Page 23, lines 9-19; Garcia dep., Exhibit I, Page 29, lines15-24):

Q. At Lunella, who took part of the tip pool? Who were the people that get paid from the tip pool?

A. Bussers, waiters, and Goran.

Q. Who is Goran?

A. Goran is the manager.

Q. Did he get paid from just the cash or just the credit cards or both?

A. What I remember is I used to give him cash, but I don't remember if he get it from the credit cards, too. But I'm sure he get cash.

* * *

Q. Were tips pooled at Lunella?

A. Yes.

Q. Who took part of the pool?

A. The servers because there was only servers. I know the manager, Goran, would take a certain percentage only of the cash tips.

Q. So you're saying that Goran would take a percentage of just the cash tips but not the credit card tips?

A. Yes.

Molina's testimony is noteworthy in that he described that at the end of the night all of the Servers and (Goran) Segota would sit at a table and divvy up the cash tips. (Molina dep., Exhibit E, Page 24 line 13 Page 25 line 2):

> Q. Does Goran get $8 off the top and they give you $92 or do they give you the $100 and it's your responsibility to give the $8 to Goran?
>
> A. No. We see all of the waiters and Goran at the table and we count how much was cash and then we split it.
>
> Q. It's at the time that it's divided when everybody is present, all the waiters are present?
>
> A. Yes.
>
> Q. So all of the waiters know or should know that Goran is getting paid tips from the cash?
>
> A. Yes.

That is startling testimony in that, as cited above, both Djecbitric and Sevilla did not recall that ever happening. They certainly were given the opportunity to answer and swear to it during their deposition. Moreover, these plaintiffs could have submitted affidavits to support this in their motion if they believed their testimony was incomplete or incorrect. However, they did not do so.

It is respectfully submitted that the requirements of "typicality" and "commonality" have not been demonstrated with respect to tips.

POINT III

PLAINTIFFS HAVE FAILED TO
DEMONSTRATE NUMEROSITY (*FRCP RULE 23(a)(1)*)

Early in this case plaintiffs made an application for conditional class certification pursuant to the *FLSA*. In that application they sought, as they do again here in this motion, to certify a class involving both front of the house (Servers, Runners, Bussers, and Bartenders) and back of the house employees (kitchen staff).

In that prior motion, despite the overwhelmingly liberal requirements permitting *FLSA* conditional class certification, this court granted conditional certification only as to front of the house employees, holding that:

> The Court does not find, however, that Plaintiffs have satisfied their burden of demonstrating that they are similarly situated to back of the house employees. . . Here, however, the Court finds that Plaintiffs have failed to muster a showing of a common policy or practice that applied to back of the house employees. The only allegations suggesting that Defendants' failure to pay overtime premiums extended to back of the house employees are Plaintiffs' statements that this was "a corporate policy that applied to all non-management employees," and that they"overheard conversations" amongst kitchen workers and dishwashers. These unsupported assertions and conclusory allegations are insufficient to conditionally certify a class. (docket #37, page 8):

It is respectfully submitted that plaintiffs have submitted nothing different now than they did before. An explanation as to why plaintiffs make the exact same argument now, based upon the exact same evidence, is easily discernible. Without adding back of the house employees, plaintiffs do not meet the numerosity requirement. (Exhibit L is a list of every front of the house Lunella employee for the past six years, totaling 38 employees.)

FRCP 23(a)(1) requires a potential class to be "so numerous that joinder of all members is impracticable." It is well settled that "a presumption that joinder is impracticable can be said to arise where the prospective class consists of 40 members or more." *Iglesias-Mendoza v. LaBelle Farm, Inc.*, 239 F.R.D. 363 (SDNY, McMahon, J. 2007). Generally, courts will find a class sufficiently numerous when it comprises 40 or more members. *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir.1995). For the foregoing reasons, plaintiffs have not met Rule 23's numerosity requirement.

POINT IV

THERE IS NO EVIDENCE REGARDING BACK OF THE HOUSEEMPLOYEES

Only unsupported assertions and conclusory allegations are proffered by plaintiffs in this case to support the inclusion of back of the house (kitchen) employees. The only factual support in plaintiffs' complaint are paragraphs 45 and 50 (docket #1) when Balverde alleges that he has "spoken" with other unnamed employees of defendants, and in paragraph 48 where he alleges that upon his "information and belief" unnamed back-of-the-house employees were also required to work in excess of 40 hours per week.

When required in his *FRCP 26* initial disclosures (Docket #22-3) to name the potential witnesses with whom he "spoke" Balverde named only three persons: Hugo "Doe," Jorge "Doe," and a person denominated as "El Tigre." He does not give their last names, or in the case of "El Tigre" any name. Never does Balverde specify whether such witnesses are current or former employees, or states the time, place, or indeed any details about these conversations.

On every shift that Balverde worked at Lunella there were approximately: 3-4 servers, 1-2 bartenders and 5-6 back of the house non management employees. Accordingly, there was ample opportunity for him to have communicated with as many as 12 current employees with whom he worked every day in order to seek and obtain factual support for a class certification.

CONCLUSION

For the foregoing reasons, plaintiffs' motion to certify a class should be denied.

Dated: New York, NY
February 19, 2017

/S/
JARED M. LEFKOWITZ, ESQ. (JL 6920)